IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. [redacted]

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Fifth Circuit.**


OTIS HILLARY RITCH,
Childersburg, Alabama,
Pro Se.

Of Counsel:
ROBERT S. VANCE,
HOGAN, CALLAWAY & VANCE,
1703 Comer Building,
Birmingham, Alabama.



St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

## INDEX.


| | Page |
|---|---|
| Prayer | 1 |
| Opinions below | 2 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Constitutional provisions involved | 2 |
| Statement of the case | 3 |
| Reasons for granting the writ | 9 |
| I. In a diversity case does the State or the Federal test of the sufficiency of the evidence to support a jury verdict apply? | 9 |
| II. Did not the Fifth Circuit's action in reversing petitioner's judgment and rendering judgment for respondent constitute a denial of petitioner's rights under the Seventh Amendment to the Constitution? | 15 |
| Conclusions | 25 |
| Appendix A—Opinion of United States Court of Appeals for the Fifth Circuit | 27 |
| Appendix B—Judgment of United States Court of Appeals for the Fifth Circuit | 45 |
| Appendix C—Order denying appellee's petition for rehearing | 46 |


### Cases Cited.


| | |
|---|---|
| A. C. L. R. Co. v. Futch (CCA-5, 1958), 263 F. 2d 701 | 25 |
| American Coal Co. of Allegany County v. DeWese (CCA-4, 1929), 30 F. 2d 349 | 20 |
| American Creosote Works v. Harp, 215 Miss. 5, 60 So. 2d 514 | 17 |
| Atlantic Coast Line R. Co. v. Gary (Fla.), 57 So. 2d 10 | 23 |

Bernhardt v. Polygraphic Company of America, Inc., 350 U. S. 198 ..... 14
Brandwein v. Elliston, 268 Ala. 598, 109 So. 2d 687.. 10
Burcham v. J. P. Stevens & Co. (CCA-4, 1953), 209 F. 2d 35 ..... 13
Byrd & Blue Ridge Cooperative, 356 U. S. 525..... 14
Caudle v. Birmingham Electric Co., 247 Ala. 34, 22 So. 2d 417 ..... 18
Central Tube Co. v. Herzog (CCA-8, 1953), 203 F. 2d 544 ..... 17, 18
Cities Service Oil Co. v. Dunlap, 308 U. S. 208..... 14
Clay County Cotton Co. v. Home Life Ins. Co. (CCA-8, 1940), 113 F. 2d 856 ..... 12
Cone v. West Virginia Pulp and Paper Co., 330 U. S. 212 ..... 18
Cooper v. Brown (CCA-3, 1942), 126 F. 2d 874 ..... 12
Crawford Johnson & Co. v. Pryor Motor Co., 219 Ala. 108, 121 So. 388 ..... 20
Crockett v. United States (CCA-4, 1940), 116 F. 2d 646 ..... 13
Dick v. New York Life Insurance Company, 359 U. S. 437 ..... 9, 14
Diderich v. American News Co. (CCA-10, 1942), 128 F. 2d 144 ..... 13
Edwards v. Southern Ry. Co., 233 Ala. 65, 169 So. 715 ..... 17, 20, 22
Elliott v. Hall, L. R. 15 Q. B. Div. 315..... 17
Erie Railroad v. Tompkins, 304 U. S. 64.... 11, 12, 13, 14, 15
Flusk v. Erie R. Co., 110 F. Supp. 118..... 17
Foster & Creighton Co. v. St. Paul Mercury Indemnity Co., 264 Ala. 581, 88 So. 2d 825..... 17, 23
Fouraker v. Hill & Morton, Inc., 162 Cal. App. 2d 668, 328 P. 2d 527..... 17
Guaranty Trust Company of New York v. York, 326 U. S. 99 ..... 12, 14
Herron v. Southern Pac. Co., 283 U. S. 91..... 11

Jackson v. Chicago, M., St. P. & P. R. Co., 238 Iowa 1253, 30 N. W. 2d 97 ..... 22
Lavender v. Kurn, 327 U. S. 645 ..... 16
Lennig v. New York Life Ins. Co. (CCA-3, 1941), 122 F. 2d 871 ..... 12
Ling v. Edenfield (CCA-5, 1954), 211 F. 2d 705 ..... 11, 13
Louis Pizitz Dry Goods Company v. Harris, ... Ala. ..., 118 So. 2d 727 ..... 10
Louisville & N. R. Co. v. Hall, 223 Ala. 338, 135 So. 466 ..... 14, 20
Lovas v. General Motors Corp. (CCA-6, 1954), 212 F. 2d 805 ..... 12
Owen v. Rheem Mfg. Co., 83 Cal. App. 42, 187 P. 2d 785 ..... 17
Pappa v. Bonner, 268 Ala. 185, 105 So. 2d 87 ..... 9
Pogue v. Great Atlantic & Pacific Tea Company (CCA-5, 1957), 242 F. 2d 575 ..... 11, 13
Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U. S. 530 ..... 14
Reuter v. Eastern Air Lines, Inc. (CCA-5, 1955), 226 F. 2d 443 ..... 13
Rowe v. Pennsylvania Greyhound Lines (CCA-2, 1956), 231 F. 2d 922 ..... 12
Rytex Co. v. Ryan et al. (CCA-7, 1942), 126 F. 2d 952 12
Schell v. Ford Motor Company (CCA-1, 1959), 270 F. 2d 384 ..... 12
Schulz v. Pennsylvania Railroad Co., 350 U. S. 523 .. 15
Sentilles v. Inter-Caribbean Shipping Corp. (1959), ... U. S. ..., 4 L. Ed. 2d 142 ..... 16
Shelby Iron Co. et al. v. Cole, 208 Ala. 657, 95 So. 47 .. 17
Southern Apartments, Inc., v. Emmett, 269 Ala. 584, 114 So. 2d 453 ..... 10
Southern Railway Co. et al. v. Edwards (CCA-5, 1930), 44 F. 2d 526 ..... 22
Stickle v. Union Pac. R. Co. (Utah), 251 P. 2d 869 .. 22

Stoner v. New York Life Insurance Co., 311 U. S. 464 ..... 11, 12, 13
Sundin et al. v. Edward Rutledge Timber Co. (CCA-9, 1918), 249 F. 809 ..... 22
Texas Employers Ins. Assn. et al. v. Texas Compress Co. (Ct. of Civ. App., Texas), 284 S. W. 2d 922 .... 17
Texas & Pacific Railway Co. v. Behymer, 189 U. S. 468 20
Twin City Hardwood Lumber Co. v. Dreger (CCA-8, 1952), 199 F. 2d 197 ..... 12
United States Cast Iron Pipe & Foundry v. Williams, 213 Ala. 115, 104 So. 28, 31 ..... 17, 20
United States Steel Corporation v. McCraney (CCA-5, 1958), 257 F. 2d 457 ..... 21, 22
Waldron v. Aetna Casualty & Surety Co. (CCA-3, 1943), 141 F. 2d 230 ..... 12
Watt v. Combs, 244 Ala. 31, 12 So. 2d 189 ..... 18
Winstersteen v. National Cooperage & Woodenware Co., 361 Ill. 95, 197 N. E. 578 ..... 17
Yandell v. National Fireproofing Corp., 239 N. C. 1, 79 S. E. 2d 223 ..... 17
Zayatz v. Southern Ry. Co., 248 Ala. 137, 26 So. 2d 545 14

**Statute Cited.**

28 U. S. C., § 1254 (1) ..... 2

**Constitution Cited.**

United States Constitution, Seventh Amendment .... 2

**Textbooks Cited.**

Federal Digest, Negligence, Key No. 5 ..... 20
Restatement of Torts, Sec. 398, p. 1080 ..... 18

**Miscellaneous Cited.**

Annual Reports of the Directors of the Administrative Office of the United States Courts, 1959, 1958, 1957, 1956 and 1955, Table B 1 ..... 23

IN THE

# SUPREME COURT OF THE UNITED STATES.

---

OCTOBER TERM, 1960.

---

No. .....

---

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

---

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Fifth Circuit.**

---

Petitioner pravs that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the judgment in petitioner's favor of the District Court for the Northern District of Alabama, and rendered judgment for Nashville Bridge Company.

## OPINIONS BELOW.

The judgment of the District Court (R. 410, 434) is unreported. The opinion of the Court of Appeals (R. 445, Appendix A) is reported at 276 F. 2d 171.

## JURISDICTION.

The opinion and judgment (R. 465, Appendix B) of the Court of Appeals were entered on March 15, 1960. A timely application for rehearing (R. 469) was denied on May 23, 1960 (R. 489, Appendix C). The jurisdiction of this court is invoked under 28 U. S. C., § 1254 (1).

## QUESTIONS PRESENTED.

1. In a diversity case does the state or the federal test of the sufficiency of the evidence to support a jury verdict apply? Did not the Fifth Circuit err in holding state law to be inapplicable?

2. Did not the Fifth Circuit's action in reversing Petitioner's judgment and rendering judgment for Respondent constitute a denial of Petitioner's rights under the Seventh Amendment of the Constitution?

## CONSTITUTIONAL PROVISIONS INVOLVED.

The Seventh Amendment of the United States Constitution is involved:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

## STATEMENT OF THE CASE.

This is a personal injury action brought by petitioner in the state courts of Alabama (R. 8). Petitioner was an employee of a consignee and was injured while unloading a railroad car, which had been loaded by respondent. The basis of petitioner's action was the alleged breach of the duty owed by respondent to petitioner under the laws of Alabama. Two railroads were joined as defendants but were acquitted of negligence in the trial court.

The cause was removed to the United States District Court for the Northern District of Alabama on petition of respondent and its co-defendants by reason of the diversity of citizenship of the parties (R. 1). Trial was had before a jury and a verdict rendered in favor of petitioner and against respondent in the amount of $58,000.00 (R. 408). The trial court overruled respondent's motion for new trial holding:

> "A careful review of the record in this case reaffirms the opinion entertained at the trial that there was evidence from which the jury could have found that defendant Nashville Bridge was negligent in loading the steel girders on the gondola car and thereafter breached its duty to plaintiff to warn him of a dangerous condition when engaged in unloading such girders and that there was evidence from which the jury could have found that plaintiff was guilty of no negligence which proximately contributed to his own injuries and damages". (R. 431)

It required, however, that petitioner remit all in excess of $30,000.00, and entered judgment for the reduced amount (R. 432, 433, 434).

On respondent's appeal the Fifth Circuit held that the evidence of respondent's negligence was not sufficient to

go to the jury and that respondent was entitled to a directed verdict. It thereupon reversed petitioner's judgment and rendered judgment for respondent.

The testimony showed that petitioner, Otis Hillary Ritch, was employed as a structural iron worker by an erection company in connection with a construction project at Republic Steel's plant in Gadsden, Alabama. On November 22, 1956, while Ritch was assisting in the unloading of a large steel girder from a gondola freight car, the car turned over and Ritch, who was then on top of the girder, was seriously and permanently injured.

The girder in question, along with a slightly smaller girder, had been fabricated by respondent, loaded by it at its Bessemer, Alabama plant, and shipped by rail to Gadsden (R. 92). No unloading instructions were forwarded (R. 166). The girder in question weighed slightly over 50,000 pounds, and was 49 feet, 11 inches long. Lying on its side it was 7'-10" high and, as loaded, the width of the girder was 30" at the top and 24" at the bottom (R. 92, 153). The two girders were loaded in the freight car with approximately 7' between centers. They were loaded against the sides—approximately 1½" out from each side of the car (R. 153). They were bolted together by 4 or 5 steel plates (R. 199) and were braced at each corner by a 6" angle iron or "lug" which was welded to the bottom of the car. Upon arrival it was found that the larger girder had shifted slightly and that one or more of the lugs had pulled loose (R. 197, 199, 235). While loading the girders, respondent had shored up (braced) one side of the car (R. 123). Respondent is experienced in the loading of heavy steel girders, having shipped 50 to 100 per year in the last 25 years (R. 166).

These were the first girders unloaded on this job (R. 289, 290). In unloading the girders a "lifting lug", which

is a piece of metal with an oval hole in it, is bolted to the center of the girder so that it will take the hook on a crane, and is thereby lifted out (R. 290). Ritch's job was to bolt on the lifting lug or "hook on" (R. 289).

On the day before the accident Ritch had burned off the lugs and plates which were attached to the car and to the girders (R. 291). At that time the smaller of the girders was lifted out of the car (the smaller girder was taken out first because it was needed first). Ritch was merely working under the instructions of his "pusher", and had nothing to do with the decision as to which girder came out first (R. 290, 292). After the first girder was taken out it began to rain, and it was necessary that work be stopped. On the afternoon of the next day, Ritch and his co-workers went out to unload the larger girder (R. 292). Ritch climbed on top of the girder, and was in position to bolt on the lifting lug which had been set down on the girder (R. 294). He felt the car moving and jumped. The car overturned, Ritch was injured, and when he came to he was in the hospital (R. 294).

Otis Ritch had been an ironworker for about three and a half years before the accident (R. 289, 309). He had never taken beams as heavy as this off a box car, but had connected beams in a building which were this heavy (R. 309), and had taken a larger one off a truck (R. 301). He had unloaded a boiler which weighed 136 tons. It was not necessary to shore up the sides of the car at that time. The boiler was simply lifted straight up off the car (R. 306). Ritch agreed that if it had been necessary there were cross ties available with which they could have shored up the car. They had shored up a flat car when the large "3900" crane had been unloaded (R. 305). He also agreed that "it is possible" that the gondola car sagged a little when the smaller girder was taken out, and he further agreed that there was some tilt to the load

before it turned over (R. 311). He stated, however, that the load had been sitting there over a day, that there was not enough tilt to make him think it would turn over, and that he didn't have any idea that the car would turn over (R. 310, 311).

Two of Ritch's fellow-employees, both of whom were experienced ironworkers, described certain of the events that took place on the day of and the day preceding the accident. Mr. E. L. Robinson testified, in addition, that in his experience the only time a freight car had been shored up before it was unloaded was when a big crane or something of that sort was going to be run onto or off of a flat car—"walking it off" the side (R. 205). He had never seen a freight car turn over in the process of unloading. Milton Alvin Nabors also had seen cars shored up on occasions when a crane was brought in, or when there was something out of the ordinary. Nabors testified that special instructions on how to unload such loads come with the car or come in advance, but that no special instructions came with these girders (R. 242).

Republic Steel's yardmaster testified that at the place where the car overturned the track was level (R. 245). He also testified that this car was handled in the usual manner and that there was no report made of anything unusual in connection with its being spotted for unloading (R. 245, 248).

Mr. Bera Vance (not related to counsel) testified for petitioner as an expert witness. Mr. Vance is an ironworker with 35 years experience, having worked for practically all of the major steel erectors in the country (R. 269). For the last 15 years he has worked mostly on bridge work involving heavy steel girders. He has worked as foreman and superintendent (R. 269, 278). On one particular job he directed the loading of all girders over

a period of four years for the construction of a 12-span bridge at Newaygo, Michigan. On that job he loaded from 45 to 50 girders a year of comparable size and weight to the ones in the present case (R. 270, 274). Mr. Vance expressed the opinion that the manner in which the girders in the present case were loaded was improper (R. 273). He explained that you try to get the weight as near the center of the car as possible (R. 273).

On cross-examination, Mr. Vance testified that he doesn't believe that he has ever seen a girder loaded to the outside of the car as here (R. 279, 280). He denied that the girder was properly braced; saying in effect that having been improperly loaded it was braced in about the only way it could be (R. 280, 275).

In answer to the inquiry as to when cars are shored up in the usual procedure of unloading in the steel erection business, Mr. Vance stated that he had only shored cars when a big 3900 (a crane) was to be walked off the side of the car (R. 287). He stated that it has been customary to give special instructions to the people who are to receive a load if any unusual methods or precautions are to be taken in unloading a car (R. 287, 288).

Mr. Joe Robert White, a mechanical engineer at Southern Precision Pattern Works, identified scale models of the gondola car and girders in question which had been constructed by him based on his inspection of the blueprints of the girders together with the detailed information obtained by discovery, which was on the blackboard at the time of his testimony (R. 323, 324). The models were constructed to scale both as to size and weight (R. 317). The weight scale was accurate to a tolerance of 1% (R. 320, 321, 324). After they were received in evidence the models of the girder, lifting lug and human figure were positioned in the car to scale in accordance with

evidence previously adduced. When touched by a juror the model turned over and the accident was duplicated in the courtroom (R. 325). The models were transmitted to the Court of Appeals along with the record in the case, and will be available to this court.

When questioned concerning the amount of the gondola car's tilt after the small girder was removed and before it turned over, Mr. White testified that the car would have tilted two degrees and ten minutes (R. 330, 350, 351). His computation of the weights and forces at the time Ritch got onto the girder showed that despite the imperceptible tilt, a very critical point had been reached, and that there was then only a friction factor keeping the car from turning over (R. 348, 349).

Respondent's only witness was the manager of the company which employed petitioner at the time of his injury. He testified that it was usual and customary practice to load girders one on each side, to connect them with plates and to place angles at the bottom (R. 357). He said further that his company's usual practice since this accident has been to shore up under cars while unloading girders, but that they had not done so prior to the accident (R. 360). He denied that it is customary for a shipper of girders to notify him as to how they are to be unloaded (R. 361). This witness admitted that he was friendly to respondent in connection with this suit (R. 366).

## REASONS FOR GRANTING THE WRIT

I.

### In a Diversity Case Does the State or the Federal Test of the Sufficiency of the Evidence to Support a Jury Verdict Apply?

The first question presents a clear split among the circuits on an unsettled and very important facet of the Erie doctrine.

In its recent decision in **Dick v. New York Life Insurance Company**, 359 U. S. 437, this court took note of the conflict which exists in connection with the stated question. Because the issue was not properly raised, however, the court declined to reach out and decide "this important question", but expressly reserved it for an appropriate case wherein it was presented, briefed and argued.

This case squarely presents the question posed by the court in the **Dick** case. Here the Fifth Circuit refused to apply Alabama's rule determining the sufficiency of the evidence to support a jury verdict, and reversed the trial court's judgment on its holding that by the federal standard the petitioner-plaintiff had failed to prove his case. The circuit's rejection of the Alabama rule is not implied—it is specifically expressed.

The so called scintilla rule provides the measure in Alabama of the minimum quantity of evidence which will create a question for the jury and which will support a jury verdict on appeal. The rule was expressed in **Pappa v. Bonner**, 268 Ala. 185, 105 So. 2d 87, as follows:

> "The rule in Alabama is that in civil cases 'the question must go to the jury if the evidence or the

> reasonable inferences arising therefrom furnish a mere "gleam", "glimmer", "spark", "the least particle", the "smallest trace"—"a scintilla"."

It is a rule which evidence a public policy of substantial trust in the jury system within this jurisdiction. We deem it inappropriate to argue the justification of the rule. Obviously, however, it is materially different from the "substantial" evidence rule which the Fifth Circuit has applied and the distinction is vital to the outcome of this case.

For our present consideration the fact that a scintilla is sufficient to make out a jury question is the less important first half of the Alabama principle. Of greater significance is the fact that a scintilla is also sufficient to support the jury's verdict on appeal.

It is quite clear from a long line of Alabama decisions, including several recent ones, **Louis Pizitz Dry Goods Company v. Harris**, ... Ala. ..., 118 So. 2d 727; **Southern Apartments, Inc. v. Emmett**, 269 Ala. 584, 114 So. 2d 453; **Brandwein v. Elliston**, 268 Ala. 598, 109 So. 2d 687, that the judgment of a trial court is due to be affirmed although supported only by a scintilla of evidence so long as it does not conflict with the great weight of the evidence.

This aspect of the Alabama law is sometimes misunderstood by note writers who are examining the scintilla rule for the first time. The grant of a new trial when a verdict is contrary to the great weight of the evidence is, of course, not peculiar to Alabama. The Alabama procedure which is strange to federal practice is the requirement that sometimes makes necessary the submission of a case to a jury although it be apparent that the great weight of the evidence favors one of the litigants. This feature of the Alabama law is pointed out only for the purpose of

avoiding the confusion caused by some commentators, since there are neither procedural questions nor questions concerning the weight of the evidence presented here. A cursory reading of the record clearly reflects that the quantity of the evidence presented on behalf of petitioner greatly outweighed that of the respondent-defendant. The sole question considered in the Fifth Circuit, and which forms the basis for the present consideration, is the substantive one dealing with the sufficiency of that evidence.

As a second reason for granting the writ petitioner will show that the Fifth Circuit erred in concluding that his evidence failed to meet the federal test of sufficiency. For present purposes, however, we assume, as the Fifth Circuit held, that under the federal rule the evidence was insufficient to support the judgment, although the Alabama test was clearly met. The question necessarily presented is whether the federal or the state rule applies.

The Fifth Circuit's holding in this case is not based on any conclusion peculiar to the scintilla rule. It is simply an application of its established rule that state tests concerning the sufficiency of evidence are inapplicable in diversity cases.[1]

The Fifth Circuit position was originally grounded on this court's holding in **Herron v. Southern Pac. Co.**, 283 U. S. 91, which was decided prior to **Erie Railroad v. Tompkins**, 304 U. S. 64. **Erie** cast aside the line of authority which preceded it and, of course, within **Erie's** sphere of operation, the prior decisions are irrelevant. **Erie** was followed by **Stoner v. New York Life Insurance Co.**, 311 U. S. 464, where, applying **Erie**, this court held that the federal court was bound by a state court determination concerning the sufficiency of evidence.

[1] See for example *Poppe v. Great Atlantic & Pacific Tea Company* (CCA-8, 1957), 242 F. 2d 373; *Long v. Edenfield* (CCA-5, 1954), 211 F. 2d 705.

A usable test for the application of **Erie** came in **Guaranty Trust Company of New York v. York**, 326 U. S. 99, where this court held a federal court in a diversity case to be "in effect, only another court of the State", and concluded that it could not, therefore, substantially affect the enforcement of the right as given by the State. The key to **Guaranty's** amplification of the **Erie** rule was expressed as follows:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation as it would be if tried in a State Court."

Certainly one cannot imagine a more apt application of **Guaranty's** outcome test than the instant case, where the state rule requires affirmance of a verdict for the plaintiff and the Fifth Circuit's conception of the federal rule led to the rendering of judgment for defendant.

A majority of the circuits hold that the question has been settled in accordance with the **Erie, Stoner & Guaranty Trust** teachings. The Second,[2] Third,[3] Sixth,[4] Seventh,[5] Eighth,[6] and probably the First Circuits[7] have all

---

[2] *Royce v. Pennsylvania Greyhound Lines* (CCA-2, 1956), 231 F. 2d 922.

[3] *Lenny v. New York Life Ins. Co.* (CCA-3, 1941), 122 F. 2d 871; *Cooper v. Brown* (CCA-3, 1942), 126 F. 2d 874; *Waldron v. Aetna Casualty & Surety Co.* (CCA-3, 1943), 141 F. 2d 230.

[4] *Lucas v. General Motors Corp.* (CCA-6, 1954), 212 F. 2d 805.

[5] *Rytex Co. v. Ryan et al.* (CCA-7, 1942), 126 F. 2d 952.

[6] *Clay County Cotton Co. v. Home Life Ins. Co.* (CCA-8, 1940), 113 F. 2d 856; *Twin City Hardwood Lumber Co. v. Dreger* (CCA-8, 1952), 199 F. 2d 197.

[7] *Schell v. Ford Motor Company* (CCA-1, 1959), 270 F. 2d 384.

concluded that under these cases the rules determining the sufficiency of evidence in diversity cases are taken from the state law. In the face of these holdings and on substantially the same authority the Fourth[8] and Fifth[9] Circuits have reached precisely the opposite conclusion.[10] The status of present confusion is dramatized by the fact that circuits on both sides of the question now hold that each of their opposite conclusions as to the meaning of **Erie** and **Stoner** are so well settled as not to admit of further inquiry. The seriousness of the matter is apparent when it is recalled that this is the facet of the **Erie** doctrine of most widespread application and greatest importance. It is the "everyday" problem which is presented in some form in virtually all jury trials in diversity cases.

The essential business of the federal courts concerning genuine federal questions places an increasingly serious load on our judicial structure. The discharge of this vital function is hindered within this circuit by the jammed dockets which result largely from forum shopping excursions of litigants in diversity cases. The differences which the Fifth Circuit has created between required proof in state courts and in federal courts, create concomitant ad-

---

[8] *Crockett v. United States* (CCA-4, 1940), 116 F. 2d 646; *Burcham v. J. P. Stevens & Co.* (CCA-4, 1953), 209 F. 2d 35.

[9] *Reuter v. Eastern Air Lines, Inc.* (CCA-5, 1955), 226 F. 2d 443; *Ling v. Edenfield* (CCA-5, 1954), 211 F. 2d 705; *Pogue v. Great Atlantic & Pacific Tea Company* (CCA-5, 1957), 242 F. 2d 575.

[10] The Tenth Circuit has reached a conclusion somewhat akin to that of the Fourth and Fifth, but under distinguishable circumstances. See for example: *Diderich v. American News Co.* (CCA-10, 1942), 128 F. 2d 144, which illustrates a holding it has repeated several times to the effect that a provision has repeated several times to the effect that a provision of the Oklahoma Constitution requiring that the issue of contributory negligence should always be left to the jury, is inapplicable in the federal courts. This situation is distinguishable in that it gets into the judge-jury relationship and involves a state requirement as to *what* issue should go to a jury rather than *when* an issue should be submitted.

vantages to one or the other of the litigants in virtually every diversity case. The inevitable result is the insistence by the favored litigant that the cause be tried in the federal court.

The feared state court bias which caused the establishment of diversity jurisdiction is not a present day reality except in rare instances. Yet a flood of diversity cases continues to clog the dockets of our district courts for the obvious reason that counsel for one of the litigants would ordinarily be remiss in his duty if he failed to avail his client of the advantage which the Fifth Circuit bestows. The different result worked by the Fifth Circuit's rule cannot be reconciled with the **Guaranty Trust** holding,[11] much less with the obvious policy considerations connected with the administration of the federal courts. The bulk of the cases which overload the district courts within the Fifth Circuit rightly belong in the state courts. Such cases would be there in much greater number if the policy of the **Guaranty Trust** opinion were applied.

In the opposite situation the Alabama Supreme Court has consistently regarded the test of the sufficiency of evidence to be a matter of substance and has applied the federal test instead of its own in litigating rights created by federal law. **Zayatz v. Southern Ry. Co.**, 248 Ala. 137, 26 So. 2d 545; **Louisville & N. R. Co. v. Hall**, 223 Ala. 338, 135 So. 466.

In causes of action created by state law, the test of required proof is an integral part of the bundle of rights

---

[11] And in addition, as petitioner hopes to show in brief following the grant of certiorari, neither can the Fifth Circuit holding be reconciled with *Byrd & Blue Ridge Cooperative*, 356 U. S. 525; *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U. S. 198; *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U. S. 530; *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, and the related cases which have sprung from *Erie*.

created—the measure of the rights which the law affords. Six Circuits have correctly determined that the test is to be provided from the law of the creating state. Under the Fourth and Fifth Circuit view the **Erie** principle is transgressed.

The issue posed in the **Dick** case is squarely presented and should be resolved in petitioner's favor.

II.

**Did Not the Fifth Circuit's Action in Reversing Petitioner's Judgment and Rendering Judgment for Respondent Constitute a Denial of Petitioner's Rights Under the Seventh Amendment to the Constitution?**

Petitioner earnestly maintains that this is not "just another fact case." We recognize that obvious limitations properly restrain this court when it is called on to "second guess" the fact determinations of intermediate tribunals. Yet it is equally clear that expediency has not repealed the Seventh Amendment and that the right to trial by jury, which Blackstone termed "the glory of the English law", is no less precious than other constitutional guarantees. This court has never held that it will refrain from taking corrective action when either the pronouncements or the course of conduct of intermediate tribunals erode the right of trial-by jury.

With manifest disregard for this court's holdings, the Fifth Circuit has effectively deprived Otis Hillary Ritch of his right to a jury trial. We will undertake to show both constitutional and demonstrable policy considerations which make it vital that this court restore that right.

As explained in **Schulz v. Pennsylvania Railroad Co.**, 350 U. S. 523, questions of negligence call for the exercise of common sense and sound judgment, and under our system of justice, whether particular conduct does or does

not constitute negligence is a matter for a jury to determine. The extent of the review to be given the jury's conclusions of fact have been delimited by this court in unmistakable terms. Thus in **Lavender v. Kurn**, 327 U. S. 645, this court held:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But **where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent**, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable" (Emphasis added).

And, from **Sentilles v. Inter-Caribbean Shipping Corp.** (1959), ... U. S. ..., 4 L. Ed. 2d 142, the following quotation brings the principle even more clearly into focus:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35; 88 L. Ed. 520, 525; 64 S. Ct. 409, 15 N. C. C. A. N. S. 647."

The existence of the duty on which petitioner's claim is based has, of course, been long established.[12] The Alabama law was unequivocally spelled out in **Edwards v. Southern Ry. Co.**, 233 Ala. 65, 169 So. 715, as follows:

> "The shipper was under a duty to load the car in a safe condition for receipt by the consignee or its servants; and if such was not the fact or condition, it was the shipper's duty to notify the consignee or its servants of such danger."

The only factual question which the Fifth Circuit could properly review was whether there was any evidentiary basis for the jury's conclusion that respondent 'breached' the duty specified by Alabama law[13] and that such breach

---

[12] See for example: *Elliott v. Hall*, L. R. 15 Q. B. Div. 315; *Winterstein v. National Cooperage & Woodenware Co.*, 301 Ill. 95, 197 N. E. 578; *Vandell v. National Fireproofing Corp.*, 230 N. C. 1, 79 S. E. 2d 223; *American Creosote Works v. Harp*, 215 Miss. 5, 60 So. 2d 514; *Flusk v. Erie R. Co.*, 110 F. Supp. 118; *Texas Employers Ins. Assn. et al. v. Texas Compress Co.* (Ct. of Civ. App., Texas), 284 S. W. 2d 922; *Owen v. Rheem Mfg. Co.*, 83 Cal. App. 42, 187 P. 2d 785; *Fouraker v. Hall & Morton, Inc.*, 162 Cal. App. 2d 668, 328 P. 2d 527; *Central Lube Co. v. Hixson* (CCA-8, 1953), 203 F. 2d 544. See also the analogous statement of duty in *United States Cast Iron Pipe & Foundry v. Williams*, 213 Ala. 115, 104 So. 28, 31.

[13] The instructions to the jury were patterned after the quoted extract from the *Edwards* case (R. 371 to 382).

We take it that the court's holding is simply that the evidence of respondent's negligence was insufficient to go to a jury. Some confusion arises out of what appears to be a calculated ambiguity in the next to last paragraph of the opinion, making reference to assumption of risk and contributory negligence. No defense of assumption of risk was even raised. If ever applicable in cases such as this, it is only applicable when the plaintiff knows, and appreciates the danger. *Shelby Iron Co. et al. v. Cole*, 208 Ala. 657, 95 So. 47; *Edwards v. Southern Ry. Co. et al.*, supra. Similarly, under Alabama law, contributory negligence requires actual appreciation of danger to be applicable in cases such as this. *Foster & Creighton Co. v. St. Paul Mercury Indemnity Co.*, 264 Ala. 581, 88 So. 2d 825. It was not disputed that petitioner had no actual knowledge or appreciation of danger. Although a consideration of the men-

proximately caused **or contributed to**[14] the injury of the petitioner.

The jury apparently had no difficulty in reaching its decision in something less than an hour (R. 428). A distinguished trial judge, with many years of judicial experience, who had seen and heard the witnesses and who had a "feel of the case which no appellate transcript can impart"[15] was clear to the conclusion that the evidence showed breaches of **both** aspects of the duty imposed by the law of Alabama (R. 431). Not only does the Fifth Circuit hold that both judge and jury were wrong in their conclusions, it holds that they were so completely and absolutely wrong as to require the extreme action of its rendering judgment for defendant and thereby forever depriving a previously successful litigant of the right to have his case decided by a jury.

When, as here, the evidentiary basis of the jury's verdict is apparent, a conclusion such as was reached by the circuit court can spring only from a concept of the appellate function in direct conflict with the Seventh Amendment.

It was not disputed that respondent gave no warning of danger, nor did it forward any special instructions concerning required extra precautions or unloading procedures. In the absence of special precautions, the position of the load made the accident inevitable. Unchallenged

---

tioned defenses would be governed by the same principles as set out in this petition, it would appear that the circuit court's decision should be considered as confined to the issue of primary negligence as is indicated throughout its opinion.

[14] The principle of concurrent negligence is recognized in Alabama. *Caudle v. Birmingham Electric Co.*, 247 Ala. 34, 22 So. 2d 417; *Watt v. Combs*, 244 Ala. 31, 12 So. 2d 189; *Central Tube Co. v. Herzog* (CCA-8, 1953), 203 F. 2d 544; *Restatement of Torts*, Sec. 308, p. 1080.

[15] *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212.

expert testimony showed that before the car overturned it had already reached a very critical point and was being held up only by a friction factor. Positioned more to the center of the car, a load would never have caused it to overturn—even if enough weight were added to crush the car. Respondent had deemed it necessary to shore up under one side of the car while loading it. But this fact was not communicated to the consignee, and in the combined experience of all the witnesses, including respondent's witness, a freight car had never been braced or shored up while a load such as this was to be lifted straight off.

From these facts alone the jury could clearly have inferred that the respondent-shipper breached the duty which the law of Alabama prescribes. But, in addition, petitioner went directly to the ultimate question and presented opinion testimony of a loading expert. His qualifications were not challenged. As an expert he testified that the loading of the car as it was done by respondent was improper.

The Fifth Circuit summarily rejected the testimony of the expert, Vance, holding his opinion to have insufficient probative value. At the same time it dealt in the opposite manner with conflicting defense evidence, holding that by respondent's self serving assertions in answers to interrogatories "it was **proven** that the car was **properly** loaded with the girders." The process of reasoning by which evidence supporting a verdict is rejected while conflicting evidence is regarded as conclusive hardly conforms to the principles of the Seventh Amendment. Patently disregarding the rule that the appellate function is to search out the evidentiary basis of the jury's conclusion, the circuit court viewed the testimony of this key witness "as a whole" and on the basis of such consideration drew its own conclusions in conflict with those which the jury has drawn.

While rejecting petitioner's evidence of **improper** loading, the circuit court stressed respondent's contention that respondent's loading method conformed to **habit** and **custom** in the area. It is, of course, self evident that the jury was free to reject respondent's evidence to this effect, particularly in view of conflicting evidence from petitioner's witnesses. In addition, the circuit court's selective acceptance and rejection of evidence is based on a fundamentally faulty legal premise. While failure to take customary precautions may constitute negligence, conformance with custom does not of itself acquit one of negligence.[16] On the other hand whether conduct is or is not "proper" is at the very heart of cases such as this and is provable by expert testimony.[17]

Several comments in its opinion are characteristic of the circuit court's process of viewing the evidence in the light most favorable to its conclusion of no liability. In this connection petitioner denies that the girders withstood transportation without complication. Such assertion is itself in conflict with uncontradicted evidence. Petitioner denies that undisputed evidence showed that the girders themselves did not cause the injury or that the injury was caused solely by reason of the unloading method. These are conclusions which the court has elected to draw from the evidence—not the evidence itself. Petitioner also denies that the court properly viewed the testimony of the expert, White, as being of little or no efficacy, while at the same time attaching importance to White's partial

[16] *Texas & Pacific Railway Co. v. Behymer*, 189 U. S. 468; *American Coal Co. of Allegany County v. DeWese* (CCA-4, 1929), 30 F. 2d 340; *Louisville & N. R. Co. v. Hall*, 223 Ala. 338, 135 So. 406; Also numerous cases collected under Federal Digest, Negligence, key No. 5

[17] *Louisville & N. R. Co. v. Hall*, supra; *United States Cast Iron Pipe & Foundry Co. v. Williams*, supra; *Edwards v. Southern Ry. Co., Crawford Johnson & Co. v. Pryor Motor Co.*, 210 Ala. 108, 121 So. 388

agreement on cross-examination with a contention, which White protested was outside the field of his expert knowledge (R. 352).

Ultimately, however, the circuit court's characterization of the evidence is not the controlling point. The central issue concerns the inferences and conclusions to be drawn from that evidence. What is a reasonable conclusion to be drawn from the evidence and who makes the determination? This court has held this to be the essence of the jury function. By its action the Fifth Circuit emphatically disputes this court's holdings.

In reaching its decision the Fifth Circuit determined that the facts were not distinguishable from those in the case of **United States Steel Corporation v. McCraney** (CCA-5, 1958), 257 F. 2d 457. The correctness of the **McCraney** decision is, of course, not now before the court but this conclusion serves to illustrate the degree of distortion in the circuit court's view of the present facts. In **McCraney** the freight car was loaded in accordance with the rules of the American Association of Railroads which was held to be due care as a matter of law. The claimed negligence apparently involved the failure to take additional precautions which would have protected the plaintiff from the ordinary dangers which occur during the unloading of a properly loaded car. Here the car was not shown to have been loaded in accordance with the rules of the American Association of Railroads.[18] Petitioner's evidence showed that it was "improperly" loaded and that it was loaded in such a way that injury was inevitable unless extraordinary precautions were taken. Although both law and custom dictated that warning or

[18] As a matter of trial strategy petitioner reserved his showing of specific rule violations for cross-examination of the expert witnesses for defendants. Since no such defense evidence was offered, the record contains no proof of specific violations.

special instructions should be forwarded by respondent, such was not done. The very nature of the two situations was vastly different. The plaintiff in **McCraney** was injured when a stake fell after all its support was removed during unloading—a phenomenon clearly within the ordinary experience of man. Here a huge freight car, presenting a look of stability like the Rock of Gibraltar, overturned in a manner that was not foreseen or reasonably foreseeable by the experienced men who were working around the car. In **McCraney**, the danger resulted solely from the employee's failure to take normal precautions in the handling of a proper load. Here, Ritch's action would have been entirely safe, reasonable and proper if the girders had been properly loaded. He had a right to assume that the car was reasonably safe for his use.[19] He had no responsibility for any decision concerning extra precautions and, in the absence of a sign of danger, he was wholly justified in going about his duties as instructed in a usual and careful manner. The only genuine similarity between the cases is in the Fifth Circuit's result.

The circuit court cited its decision in **Southern Railway Co. et al. v. Edwards** (CCA-5, 1930), 44 F. 2d 526, to support its conclusion that respondent owed no duty which was here breached. That case has no current validity for the point cited in view of the pronouncement of Alabama law six years later in the same case by the highest court of this State.[20] But even so, neither **Edwards** opinion supports the Fifth Circuit's present position. Those cases dealt with an apparent peril and one which was, in fact, recognized. Here, although the physical characteristics

---

[19] *Jackson v. Chicago, M., St. P. & P. R. Co.*, 238 Iowa 1253, 30 N. W. 2d 97; *Sundin et al. v. Edward Rutledge Timber Co.* (CCA-9, 1918), 249 F. 809; *Stickle v. Union Pac. R. Co.* (Utah), 251 P. 2d 869.

[20] *Edwards v. Southern Railway Co.*, 233 Ala. 65, 169 So. 715.

of the car were obvious, the danger was not, in fact, recognized and was not such that a man of ordinary intelligence could be expected to anticipate it. Knowledge of danger and knowledge of nothing more than the source of danger have substantially different legal consequences.[21]

A shipper is charged with knowledge of the dangers which are inherent in a shipment as loaded. Unless danger is obvious it has no right to expect that the shipment will be unloaded otherwise than in the usual manner. The law of Alabama imposes the duty to load so that the shipment may be unloaded safely and if such is not the case to give warning of the danger. It cannot be disputed that if this load had been positioned in the center of the car, it could have been unloaded in the usual and customary manner without any danger whatever of the car's turning over. There can likewise be no reasonable question but that, if warning had been given or unloading instructions forwarded, the injury would not have occurred. Even absent the testimony of the expert, Vance, petitioner's evidence made out a classic jury case. With such testimony it is manifestly unreasonable to hold that as a matter of law respondent was wholly free of negligence which contributed to petitioner's injury and that there is no evidentiary basis whatever for the opposite conclusion.

The propensity of the Fifth Circuit to "jump into the jury box" is well known. It is illustrated by the fact that over the past five years this circuit has lead all others in reversing judgments in cases such as this.[22] The Fifth

[21] *Atlantic Coast Line R. Co. v. Gary* (Fla.), 57 So. 2d 40; *Foster & Creighton Co. v. St. Paul Mercury Indemnity Co.*, 264 Ala. 581, 88 So. 2d 825.

[22] *Annual Reports of the Director of the Administrative Office of the United States Courts*, 1959, 1958, 1957, 1956 and 1955, Table C 2. That table for the years specified shows further that in the category "private civil" cases, the Fifth Circuit has averaged about one reversal for each three cases. All circuits, including the Fifth,

Circuit's record setting pattern of interference with jury awards exists despite, rather than because of, the character of this circuit's juries. Illustrative is the fact that out of all the personal injury and death cases in which the maimed and the mauled, the multiple amputees and the paraplegics have passed before the bar in the Northern District of Alabama, the all time record jury verdict is $65,000. Only a handful have amounted to a third of that amount. There are other districts within the Circuit where verdicts run even smaller. The conservatism of our juries should justify the least interference with their verdicts, rather than the most.

The Fifth Circuit's record of reversals proves little in connection with the outcome of any individual case. Collectively, however, its reversals show the importance of this Court's review when error by the circuit court clearly appears. By its record the Fifth Circuit announces to unsuccessful litigants "Appeal and we will retry your rejected factual contentions." It can hardly be doubted that if the clear pronouncements of this court concerning the scope and nature of appellate review of fact questions were actually applied by our circuit court the number of appeals on pure fact questions would decrease dramatically. It would be wholly unrealistic, however, to expect a change in the type of fact review indulged in by the Fifth Circuit in the absence of directly instructive measures by this court. By limiting its considerations to the exclusion of the question now presented, this court would ultimately add to, rather than subtract from, the workload being generated at the appellate level.

There is much more to this question, however, than considerations of administrative policy. In substituting its

---

have averaged less than one in four. The proportion of the Fifth Circuit's reversals has been over 250% of that of the First Circuit, 170% of that of the Second, 173% of that of the Sixth and substantially higher than that of any other circuit.

judgment for that of the jury the circuit court has employed a transparent device for syphoning off the right to a jury trial by mislabeling questions of fact as questions of law. In his dissent in **A. C. L. R. Co. v. Futch** (CA-5, 1958), 263 F. 2d 701, the distinguished present Chief Judge of this Circuit stated:

> "Two per curiam reversals of our Fifth Circuit within the past few years have, in effect, admonished us that verdicts in diversity cases are protected by the Seventh Amendment. Nevertheless, with deference, I submit that the present decision makes it obvious that we have not yet learned that lesson."

With deference petitioner submits that these words are even more in point here. Under the facts presented, the extreme action of the Fifth Circuit in forever depriving this litigant of the award which he had received at the hands of a jury was a clear denial of the rights which the Seventh Amendment guarantees.

## CONCLUSIONS

The Fifth Circuit erred in holding the state test of the sufficiency of evidence required to support a jury verdict to be inapplicable. The question presents a clear split among the circuits on an important question of general application. The conflict should be eliminated and the injustice to petitioner corrected.

The Fifth Circuit erred further in holding petitioner's evidence to be insufficient even under the federal test. It reached its conclusion by a technique of discounting petitioner's evidence, resolving conflicts in favor of the respondent, drawing inferences which were rejected by the jury and rejecting inferences which were accepted by the jury. By reweighing the facts, discarding a jury award and rendering its own judgment, that court has cruelly and

erroneously denied petitioner his rights under the Seventh Amendment. Both constitutional and policy considerations require that this action be reversed.

For the reasons set out above it is respectfully submitted that this petition for writ of certiorari should be granted.

.....

OTIS HILLARY RITCH,
Childersburg, Alabama,
Pro Se.

**Affidavit of Service.**

State of Alabama, }
Jefferson County. }

I, Robert S. Vance, of counsel for petitioner herein and an attorney of record for petitioner in the court below, depose that on the ..... day of August, 1960, I served a copy of the foregoing Petition for Writ of Certiorari on the respondent by delivering a copy hereof to Frank M. Young, Esquire, one of its Attorneys of Record, at 805 First National Building, Birmingham, Alabama.

.....

Robert S. Vance.

Subscribed and sworn before me at Birmingham, Jefferson County, Alabama, on this ..... day of August, 1960.

.....

Notary Public—State at Large.

My commission expires: